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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 354

UNITED STATES OF AMERICA

vs.

SOUTH-EASTERN UNDERWRITERS ASSOCIATION, et al

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

INTEREST OF THE COMMONWEALTH OF VIRGINIA

The ultimate question before the Court in this case is whether the Sherman Antitrust Act, as amended by Act of August 17, 1937, is to be construed as applicable to the insurance business. Virginia statutes have set up

a comprehensive system of regulating the various types of insurance covering risks in this State. The system is predicated upon the hypothesis that the Sherman Act does not apply to insurance. It is based upon the long recognized principle that insurance rates are to be regulated and not subject to the cross-fires of competition with its resulting discriminations in favor of large interests. In this system of rate regulation in order to determine and fix proper premium rates, the State has utilized the loss experiences compiled under certain specified conditions by the insurers, and this has necessitated joint action by the various underwriters. The Government claims such joint action would violate the Sherman Act if the act applies to insurance contracts. It is impossible to foretell the degree of confusion and uncertainty which would follow a requirement that the State systems of regulation should be remodeled to conform to the antitrust law. It is believed that a chaotic condition would follow, and that this would not be in the public interest. For this reason this *amicus curiae* brief is filed on behalf of the Commonwealth of Virginia. It will be restricted to the two following points:

I. Regardless of whether this Court might be of opinion that its recent decisions would justify a holding that insurance is commerce, the proper interpretation of the Sherman Act does not permit the inclusion of insurance contracts within its provisions.

II. The particular problem relating to the regulation of insurance companies which the

Department of Justice seeks to solve in this proceeding can be more effectively dealt with through co-operative action by the Federal and State Governments than by the drastic and perhaps destructive remedy here under consideration.

ARGUMENT

I.

Regardless of Whether this Court Might Be of Opinion That Its Recent Decisions Would Justify a Holding That Insurance is Commerce, the Proper Interpretation of the Sherman Act Does Not Include Insurance Within Its Provisions.

The statute, in defining the transactions embraced within its terms, confines same to acts in "restraint of trade or commerce among the several States, or with foreign nations". This is substantially the same language used in the Commerce Clause of the Constitution that Congress shall have power "to regulate commerce with foreign nations and among the several states". In employing this language Congress must be held to have intended it to mean what this Court, prior to the enactment of the statute, had held that said language meant. In *Kepner* v. *U. S.*, 195 U. S. 100, this Court said:

> "It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial

decision, is presumed to be used in that sense by the legislative body. *The Abbotsford,* 98 U. S. 440, 25 L. Ed. 168."

See also:

U. S. v. *Merriam,* 263 U. S. 179, 187.

25 Ruling Case Law, Statutes, sec. 236, p. 992.

Helvering v. *Griffiths* (1943), 63 Sup. Ct. Rep. 636.

Kirschbaum v. *Walling,* 316 U. S. 517.

At the time the Sherman Act was passed (July 2, 1890), this Court had clearly and unequivocally decided in four cases that insurance contracts were not embraced within the meaning of the phrase "commerce among the several States". In fact, it was held not to be "commerce" at all.

Paul v. *Virginia,* 8 Wall. 168 (1869)

Ducat v. *Chicago,* 10 Wall. 410 (1870)

Liverpool Ins. Co. v. *Oliver,* 10 Wall. 566 (1871).

Phila Fire Assn. v. *New York,* 119 U. S. 110 (1886).

This judicial definition of the word "commerce" as not including insurance, which was in full force and effect at the time of the passage of the Sherman Act, has been recognized and reaffirmed in numerous decisions of this Court since that time, as appears from the cases referred to in other briefs filed in this case. This Court has never departed from that definition.

Whatever may be the view of this Court at the present time as to the correctness of this judicial interpretation

of the language "commerce among the States", there is no doubt as to its legal meaning at the time the Sherman Act was passed in 1890 or amended in 1937. Therefore, there can be no doubt that at the time of the passage and of the amendment of said Act the business of insurance was not embraced within its provisions. It cannot be reasonably argued, therefore, that Congress intended the provisions of the Act to apply to insurance. It might well have been the case that, if there had been any doubt at the time of the enactment that insurance was excluded from its provisions, such business would have been expressly exempted therefrom. It is impossible for this Court to say what might have been the action of Congress in 1890 if "commerce among the several States" had been judicially defined as the Government now contends it should be. Therefore, the intention that the Act should apply to the insurance business cannot now be imputed to Congress. The question whether the definition of the term "commerce among the several States" might at this time be revised so as to include insurance is obviously not involved in this case, but is a moot question. The only question properly presented for decision here is what was the judicially defined meaning of the words used in the Act at the time it was passed.

II.

The Particular Problem Relating to the Regulation of Insurance Companies Which the Department of Justice Seeks to Solve in this Proceeding Can Be More Effectively Dealt With Through Co-operative Action by the Federal and State Governments Than By the Drastic and Perhaps Destructive Remedy Here Under Consideration.

In the summer of 1940 the Attorney General of the United States inaugurated a movement to promote co-operation between the Federal and State Governments to the end that their respective activities might be harmonized and united in attacking the many difficult problems arising out of the then existing emergency conditions and threats of war. At that time a conference was held in the Department of Justice Building attended by representatives of the Attorney General, the Governors' Council, the National Association of State Attorneys General, the Interstate Commission on Crime, and the Council of State Governments. Other similar conferences were held later which, in addition to the above, were attended by a great number of officials of the several States, and the general problems involved were discussed and considered at length. As a result of these conferences, a Drafting Committee was created, consisting mainly of representatives of State governments, the function of which was to draft model statutes for enactment by State Legislatures. This committee, acting under the auspices of the Council of State Governments and the Department of Justice, has considered many problems confronting the various departments of the Federal Government in connection

with emergency and war conditions. Representatives of the departments from time to time appeared before the committee, usually with a tentative draft of a proposed State statute designed to empower State governmental agencies to perform such functions as the several departments recommended in furtherance of the war effort. A great many model bills were approved at the numerous meetings of the Drafting Committee and these were transmitted by the Council of State Governments to the States for consideration by their legislatures. Most of them, with slight modifications to meet local conditions, the State legislatures have enacted.

That this movement to promote Federal-State co-operation has been successful, and that its results have proved of great benefit to the Navy, War, and other Departments, as well as to the States, was the view expressed by Attorney General Biddle at a recent meeting of the Drafting Committee. He also expressed at that time the hope that the functions of the committee and of the Department of Justice in connection therewith, might be so extended as to bring about like co-operation in other fields of government than those related to the war effort. It will be a magnificent achievement if this hope can be realized. Nothing could contribute more to the successful functioning and preservation of our dual system of government than such a continuation of these efforts at co-operation.

The problem of regulating the insurance business is an ideal one for such co-operative action. While the problem is, in the main, local in its nature, there are doubtless many phases of it in the solution of which

Federal regulatory assistance is desirable and would be welcomed by the States. If the Department of Justice has uncovered evils which it feels should be remedied, it is believed that such evils can most effectively be dealt with by co-operative action between the States and the Department of Justice. If additional State legislation or Congressional action is deemed desirable, a conference, at which the facts are disclosed, should result in agreement upon the action necessary to provide the needed remedy. But to drop a destructive bombshell at this time into the very heart of the State regulatory systems would be akin to burning down the house to kill the rats. Congress has not seen fit to undertake to set up a system of insurance regulation. The State systems are all we have. If the States were hindered in their efforts by applying the Sherman Act to them, and by a redefinition of interstate commerce so as to include the insurance business, this business would be left without any effective regulation.

While there is no doubt of the power of Congress to regulate the insurance business in so far as it affects interstate commerce, and nothing would be gained so far as such Congressional powers are concerned by a decision of this Court that the insurance business is interstate commerce, such a decision would have a most detrimental effect upon the regulatory powers of the State. Insurance is a much regulated business. The agents and their compensation are regulated. The companies are required to file reports, to deposit securities with State agencies, and to assist in compiling loss experience records. The States prescribe policy forms and rules for the interpretation of policies, securities

in which investments are permitted, and many other regulations. Although it is true that the States may regulate local affairs in interstate commerce in fields where there is no Federal regulation, they do not possess the same freedom to exercise this power in transactions which are themselves constituent parts of interstate commerce as in matters which merely affect such commerce.

Without meaning to assume an alarmist attitude, it does not require too vivid an imagination to visualize some of the injurious results which would flow from a decision that the insurance business is interstate commerce. Aside from the impact of the Sherman Act upon State regulation of premium rates, and doubt whether this would longer be permissible, nearly all other regulatory measures relating to insurance companies and their agents would be subject to challenge as an undue burden on or obstruction of interstate commerce. Injunctions suspending their operation would be sought and in many cases granted pending final decision in this Court.

What has been said above is not intended in any way as a disparagement of the actions of the antitrust division of the Department of Justice. It is but a common attribute of human nature for a public officer to view a problem presented to him as being within the proper function of his office to remedy, and the Division naturally turned to the Sherman Act as providing that remedy. Whether that view would have been taken if the matter had come to the office created to promote Federal-State Co-operation, however, may well be doubted.

CONCLUSION

It is respectfully submitted that this case is not one of sufficient urgency to call for a departure from the rule that judicially defined words used in a statute will be construed in conformity with such then existing definition; and that, so construed, no question is presented requiring the Court to reexamine the question whether the business of insurance is interstate commerce at this time.

Respectfully submitted,

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Attorney General of Virginia.